



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Energy Container Corporation

**File:** B-235595.2

**Date:** November 2, 1989

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### DIGEST

1. Contracting officer has constructive knowledge of a mistake in an offer before award where, based on offeror's pricing pattern in prior submissions, contracting officer should have suspected a mistake and requested clarification prior to contract award.
2. Agency properly allowed offeror to correct a mistake in an extended price in its second best and final offer without reopening discussions with the displaced awardee where offeror's pricing pattern throughout the negotiation process clearly indicated intent to offer the stated unit price rather than the extended price.
3. Where offeror's prices for step-ladder quantities of option items are added to its price for the basic requirement and offeror remains low when its total price is evaluated against another offeror's total price, which included single unit prices for option quantities, contracting agency properly concluded that offeror proposing step-ladder quantities of option items was offering lowest price notwithstanding its higher prices for certain quantities of the option items.

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### DECISION

Energy Container Corporation (ECC) protests the termination of its contract and the award of a contract to Tolo, Incorporated, under request for proposals (RFP) No. F04606-88-R-53353, issued by the Department of the Air Force, McClellan Air Force Base, California, for the redesign and production of primary and secondary weapons bay fuel tanks for F-111 aircraft. ECC contends that the Air Force improperly allowed the correction of a mistake in Tolo's proposal; that the agency failed to evaluate Tolo's option prices in accordance with the RFP's terms; and that Tolo's offer was materially unbalanced as to prices for the option quantities.

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We deny the protest.

The RFP was issued on August 23, 1988, for a basic requirement of 72 sets of tanks constructed with contractor-furnished material and fitted with contractor-furnished pumps, piping, valves, wiring and instrumentation; and an option quantity of 1 to 36 additional sets of tanks constructed with contractor-furnished material and fitted with government-furnished material. The RFP required prices for the option quantities, as follows:

<u>Item</u>	<u>Supplies/ Services</u>	<u>Qty</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Amount</u>
007	Weapons bay fuel tank (secondary)	1-36	Ea.	\$ ____	\$ ____
008	Weapons bay fuel tank (primary)	1-36	Ea.	\$ ____	\$ ____

The solicitation advised offerors that the agency would evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement.

Only ECC and Tolo submitted offers by the November 14 closing date for receipt of proposals. Best and final offers (BAFOs) were received on December 12. Prior to contract award, Tolo alleged that there was a labor hours computation error in its offer. While the alleged mistake was under consideration, the agency amended the statement of work. As a result, discussions were reopened and the offerors were requested to submit a second BAFO by March 20, 1989. ECC was awarded the contract on May 4, based on its total evaluated price of \$9,898,416. Tolo's total evaluated price was \$11,473,760 (\$9,387,632 for the basic requirement plus \$2,086,128 for the options).

After contract award to ECC, Tolo claimed that there was a mistake in its offer. Specifically, Tolo claimed that it had inadvertently inserted the extended price for primary tanks (line item 0001AD) as the extended price for secondary tanks (line item 0002AD), as follows:

<u>Item</u>	<u>Supplies/ Services</u>	<u>Qty</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Amount</u>
0001AD	Production articles	72	Ea.	\$60,674	\$4,368,528
0002AD	Production articles	72	Ea.	\$28,549	\$4,368,528

Tolo maintained that its unit price for line item 0002AD was correct and that based on the corrected extended price of \$2,055,528, it should have been awarded the contract as the lowest-priced offeror.

After meeting with Tolo to discuss the mistake, the Air Force determined that correction of the extended price for line item 0002AD should be allowed because the contracting officer had failed to detect the allegedly obvious mistake and the RFP incorporated Federal Acquisition Regulation (FAR) § 52.215-13, which provides that in case of a discrepancy between the unit price and the extended price, the unit price will be presumed to be correct. After correction, Tolo's price for the basic requirement was \$7,074,632, or \$1,931,704 less than ECC's \$9,006,336 price for the basic requirement. Tolo's total price, with options evaluated at \$2,086,128, was \$9,160,760, or \$737,656 less than ECC's \$9,898,416 total evaluated price. Thereafter, the Air Force terminated ECC's contract and awarded the contract to Tolo on June 30.

ECC contends that Tolo's final BAFO was ambiguous and that the Air Force applied the wrong standard in allowing correction of the mistake. ECC points out that the RFP clause, FAR § 52.215-13(c), specifically states that the unit price "will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake." The protester contends that in accordance with FAR § 15.607, correction of the mistake should only have been allowed if the existence of the mistake and the intended price could be established by clear and convincing evidence from the solicitation and the proposal. ECC contends that since Tolo's mistake could not be established under this standard, correction was improper.

The agency maintains that correction of Tolo's mistake was proper and in accord with established law. The Air Force states that the solicitation clause raising the presumption in favor of the unit price controlled the contracting officer's decision to allow correction of the obvious mistake in Tolo's offer. In making this determination, the

agency states the contracting officer properly considered Tolo's prices in its initial proposal and first BAFO.

We find that the Air Force properly allowed correction of Tolo's offer.

Where, as here, a mistake in an offer other than the awardee's offer is first alleged after award, the general rule is that the unsuccessful offeror must bear the consequences of its mistake unless the contracting officer was on actual or constructive notice of an error before award. BECO Corp., B-219651, Nov. 26, 1985, 85-2 CPD ¶ 601.

Based on the record, we find that the contracting officer had constructive notice of the mistake in Tolo's extended price for item 0002AD before contract award. In its initial proposal, Tolo's unit price for item 0002AD was \$19,936, and its extended price was \$1,435,392. In its first BAFO, Tolo's price for that item again was \$19,936 per unit and its extended price was \$1,435,392. Tolo then alleged a labor hours computation error in the first BAFO, and its corrected price sheet which was submitted to the contracting officer for consideration shows a unit price of \$28,754 and an extended price of \$2,070,288 for item 0002AD. The \$28,549 unit price for that item in Tolo's second BAFO is \$205 less than its prior unit price; however, the extended price in the second BAFO represented an increase of up to \$3 million over Tolo's earlier extended prices for item 0002AD. In these circumstances, the contracting officer should have suspected a mistake in Tolo's BAFO and requested clarification prior to contract award.

Contracting officers are required to examine all proposals for minor informalities or irregularities and apparent clerical mistakes. FAR § 15.607(a). When a mistake is suspected before award in a negotiated procurement, the FAR contemplates that the mistake will be resolved through clarifications or discussions. See FAR §§ 15.607(a) and 15.610(b)(4). The thrust of the regulation is that correction of a mistake, without conducting discussions with all offerors, is appropriate only where the existence of the mistake and the proposal actually intended can be clearly and convincingly established from the RFP and the proposed itself. Stacor Corp., B-231095, July 5, 1988, 88-2 CPD ¶ 9.

Here, although the contracting officer met with Tolo with regard to the mistake, communications were not required to clarify the mistake because Tolo's prior submissions clearly indicated that its extended price for item 0002AD was incorrect and was merely an inadvertent repetition of the total price for item 0001AD. In these circumstances,

since the contracting officer had constructive notice of the mistake in Tolo's extended price, and Tolo's prior submissions clearly suggested a pricing pattern which indicated that the unit rather than the extended price was correct, the contracting officer properly allowed correction of the mistake in Tolo's extended price.

ECC also contends that Tolo's offer was not evaluated in accordance with the RFP's terms. Specifically, the protester states that the RFP required one unit price for an option quantity of from 1 to 36 units of each type of tank (line items 0007 and 0008), and stated that offers would be evaluated by adding the total price for all options. Instead of a single option price for each type of tank, Tolo offered step-ladder prices for three different quantities (1-9, 10-35 and 36) of each option item.

ECC contends that the Air Force improperly calculated Tolo's option prices based on the price for 36 items, rather than on the step-ladder prices for different quantities of the item. The protester contends that if the agency had properly evaluated Tolo's offer, ECC would have been the low offeror. ECC further alleges that Tolo's option pricing was unbalanced and could result in costs that are far higher than Tolo's evaluated option price if the Air Force orders less than the maximum quantity of option items.

The Air Force states that during discussions both offerors were informed that the evaluation of options would be based on the maximum quantity of 36 and that ECC's suggested method for the evaluation of Tolo's step-ladder quantities of the option items was never contemplated by the parties. Additionally, the agency states, the RFP did not prohibit an offeror from providing different prices for step-ladder quantities of the option items. The agency contends that the evaluation of both proposals was consistent with the RFP's evaluation scheme because both ECC's and Tolo's option prices were evaluated on the basis of the maximum quantity of 36. The agency also maintains that Tolo's offer was not unbalanced as to the prices for the option quantities.

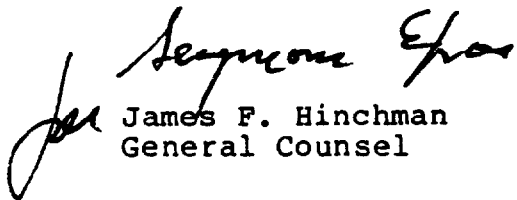
The RFP states that anywhere from 1 to 36 of either of the option items may be required, and included a single line for each option's unit price. ECC proposed unit prices of \$16,388 and \$24,582 for option items 0007 and 0008, respectively. Tolo, on the other hand, submitted step-ladder prices, as follows:

<u>Item</u>	<u>Qty</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Amount</u>
007	1-9	Ea.	\$ 58,303	—
	10-35	Ea.	\$ 34,085	—
	36	Ea.	\$ 24,656	\$887,616
008	1-9	Ea.	\$ 78,648	—
	10-35	Ea.	\$ 46,001	—
	36	Ea.	\$ 33,292	\$1,198,512

As a preliminary matter, Tolo calculated its total option prices on the basis of the prices shown for 36 of the items. Accordingly, there is no reason to assume that Tolo intended its option pricing to be cumulative (i.e., the first 9 priced at \$58,303, the next 26 priced at \$34,085 and only the last item priced at \$24,656), as ECC contends was the proper method of evaluation. The Air Force therefore properly evaluated the options based on the maximum quantity for each item rather than the step-ladder prices for different quantities of the items.

Further, although Tolo's prices for smaller quantities of the option items are higher than ECC's, our evaluation of the prices for the smaller quantities indicates that Tolo's total price would remain low even in the worst case scenario. For example, if 35 of each option item are ordered, Tolo's price would be \$2,803,010, which is \$1,369,060 higher than ECC's price. However, because Tolo's price for the basic requirement is \$1,931,704 less than ECC's basic price, Tolo's total price for the basic and option items would still be lower than ECC's price by \$562,644. The Air Force therefore properly determined that Tolo offered the lowest price.

The protest is denied.

  
 James F. Hinchman  
 General Counsel